Practice Alert: Impact of the 2016 DOL Appropriations Bill on the H-2B Program

The 2016 Consolidated Appropriations Act (Public Law 114-113), signed on December 18, 2015, contains several provisions within the Department of Labor (DOL) Appropriations Act (Division H, Title I) and the Department of Homeland Security Appropriations Act (Division F, Title V), which impact the H-2B non-agricultural visa program, effective January 1, 2016. In response to the changes, the DOL Office of Foreign Labor Certification (OFLC) released "Emergency Guidance" on December 29, 2015 (updated January 5, 2016) regarding the implementation of these new provisions. In the coming weeks, OFLC will integrate the emergency guidance into the applicable program pages on its website and, where necessary, disseminate additional public announcements.

The changes in the H-2B program come at a critical time as practitioners and employers are starting to prepare and file H-2B petitions for the second half of the fiscal year and rush H-2B filings for the first half in anticipation of visa numbers running out before the start of the second half, as they did in January 2015. This practice alert explains the changes to the H-2B program and provides guidance to supplement the DOL Emergency Guidance.

Returning Worker Exemption for FY2016: Title V, Sec. 566 of the DHS Appropriations Act amended INA §214(g)(9)(A), which provided an H-2B cap exemption for returning workers in FY2007, to create such an exemption for FY2016. Specifically, any alien who has already been counted toward the H-2B cap during FY2013, 2014, or 2015 **will not** be counted toward the H-2B cap for FY2016. This provision is critical in light of the shortage of H-2B visa numbers we experienced in FY2015. Employers seeking consular processing or a change of status for returning workers should list the names of the workers on the I-129 petition, clearly note that they are returning workers, and provide the information and certification requirements outlined in INA §214(g)(9)(B).

Staggered Entry for Workers in the Seafood Industry: Sec. 111(a) and (b) of the DOL Appropriations Act permits employers in the seafood industry to bring workers described in an approved H-2B petition "into the United States any time during the 120-day period beginning on the start date for which the employer is seeking the services of the nonimmigrants without filing another petition." Workers may not be brought into the United States after the date that is 90 days after the start date unless the employer completes a new labor market assessment by listing job orders in local newspapers on two separate Sundays, and posting the position on the Department of Labor Electronic Job Registry and at the employer's place of employment. Sec. 111(a)(2)(A). In this case, the employer must offer the job to any equally or better qualified U.S. worker who applies for the job and is available at the time and place of need. Sec. 111(a)(2)(B).

Section 108 of the 2015 Consolidated Appropriations Act (Public Law 113–235) also included a comparable "staggered entry" provision. DOL and DHS determined that this legislation constituted "a permanent enactment," and thus incorporated these requirements into the 2015 H-2B interim final rule (IFR) at 20 CFR §655.15(f).

Private Wage Surveys: Sec. 112 of the DOL Appropriations Act instructs DOL to accept private wage surveys even in instances where Occupational Employment Statistics (OES) survey

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data is available unless the methodology and data in the provided survey are not statistically supported. Employers must use the revised Form ETA 9165 to submit a request for prevailing wage determination based on a private wage survey submitted on or after December 19, 2015. The CO will issue a Request for Information requiring the employer submit the revised form for any survey-based PWD requests submitted without the revised form.

No Enforcement of Corresponding Employment and Three-Fourths Guarantee Provisions: Sec. 113 of the DOL Appropriations Act prohibits DOL from using FY2016 funds to enforce the definition of "corresponding employment" found at 20 CFR §655.5 or the three-fourths guarantee rule found at 20 CFR §655.20(f), though these provisions remain in effect and still impose a legal duty on employers. DOL will still enforce the requirement that employers must offer at least the same wages and working conditions to U.S. workers who are hired during the recruitment period for positions covered by the relevant ETA-9142B. However, employers are not required to offer the three-fourths guarantee as part of the assurance and content of job orders submitted to the State Workforce Agency and in the content of advertisements.

Definition of "Temporary Need": Sec. 113 of the DOL Appropriations Act changed the definition of "temporary" from 9 months, as provided by 20 CFR §655.6(c) (amended by the April 29, 2015 IFR) to the definition at 8 CFR §214.2(h)(6)(ii)(B) ("one year or less"). Therefore, in theory, an employer could seek up to 12 months of employment (and in the case of a one-time event, up to 3 years), as long as it can document that the nature of its need is temporary–a one-time occurrence, a peak load need, a seasonal need, or an intermittent need. However, it remains to be seen how DOL will interpret this provision and whether it will cap "temporary need" at 10 months on a de facto basis.

Suspension of Audits and Assisted Recruiting: Sec. 114 of the DOL Appropriations Act prohibits the use of funds for audit examinations (20 CFR §655.70) and assisted (supervised) recruitment (20 CFR §655.71). Therefore, effective immediately, OFLC will not issue any new H-2B audit or supervised recruitment requests and will suspend the processing of all such pending requests. OFLC will issue discontinuation notices on all pending audit requests, and employers are not required to respond to any notices associated with a pending audit examination. OFLC will also issue discontinuation notices for cases under assisted/supervised recruitment. Please note, however, that this does not impact Wage & Hour audits/investigations. Despite the current lack of funding for audits, employers should continue to maintain audit files as there is no guarantee that funding for audits will not be reinstated in the future.

Revised ETA-9142, Appendix B: DOL has revised Appendix B to the ETA 9142 to reflect the changes in the DOL Appropriations Act. Employers must use the revised Appendix B for all H-2B applications filed on or after February 1, 2016. If the application does not include the revised Appendix B, DOL will issue a Notice of Deficiency requesting it. For applications filed before February 1, 2016, DOL will provide a revised Appendix B upon certification, along with instructions in the Final Determination Letter for completing the revised Appendix B and submitting it to USCIS.